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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

No. 814

RICHARD D. IRWIN AND ANNE MARIE IRWIN,
Petitioners,

vs.

DEMPSEY-TEGELER & CO., INC., A CORPORATION,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI.

(Opinion of District Court.)

JOHN H. BISHOP,
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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI.

(Opinion of District Court.)

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division
No. 66 C 2180

MEMORANDUM OPINION.
(Filed April 1, 1968)

Plaintiff's Motion for Summary Judgment.

This is a two count action for conversion and breach of contract. Plaintiff, Dempsey-Tegeler & Co., Inc., has moved for summary judgment.

The factual situation leading to this litigation is somewhat complex, and in order to properly consider the motion for summary judgment, we will set forth the circumstances in detail. It should be noted that numerous documents and voluminous briefs have been furnished to the Court in connection with the instant motion, and considerable depositional discovery has already taken place.

Plaintiff, a securities dealership agency, seeks to recover from defendants Richard D. and Anna Marie Irwin, its former customers, damages for 500 shares of stock of National Video Corporation, which, the complaint alleges, the defendants converted and failed to deliver to plaintiff in breach of their contractual obligations. The defendants are husband and wife, who dealt with the plaintiff through Robert Shields, a securities salesman employed by plaintiff in its Chicago Heights, Illinois, office. Defendant Richard

Irwin is the founder, president, and principal stock holder of Richard D. Irwin, Inc., a publicly held book publishing company. He apparently is a man with impressive business credentials, who has engaged in a substantial volume of stock market transactions during the past several years. A large percentage of his trading was conducted through Mr. Shields, commencing in late 1963. All of defendants' transactions with plaintiff were cash transactions, and plaintiff never arranged any credit for defendants to purchase or carry securities. Mr. Irwin handled all securities transactions for his wife's account and had full authority from her to buy or sell securities on her behalf. Because of the demands of his employment, and the frequent travel that entailed, Irwin was unable to follow the stock market regularly. Consequently, he told Shields at the outset of their relationship that he would require Shields to keep a complete record of his securities transactions and positions, so that he would know what stocks he owned, and what his positions and costs were. Irwin kept no account book or separate record of his securities transactions. Shields maintained a reference book which reflected Irwin's position with respect to securities the Irwins had purchased or sold.

The present litigation stems from a series of transactions in stock of National Video Corporation, carried out by the defendants through the plaintiff during 1964 and 1965. In December, 1964, and April, 1965, defendants purchased a total of 1500 shares of National Video stock at an approximate cost of $42,500. On September 29, 1965, the Irwins sold 500 shares of National Video through Dempsey-Tegeler. According to the rules of the American Stock Exchange and the rules of the National Association of Securities Dealers, the shares so sold were required to be delivered by defendants to plaintiff by October 5, 1965. They

were not delivered by that date, and in fact, were not delivered until October 19, 1965.

However, in the interim, on October 13, 1965, by action of the shareholders of National Video, each outstanding share of National Video held of record as of October 14, 1965, was split two for one. On October 8, 1965, the American Stock Exchange made a ruling concerning the proposed split, which provided that, if the split became effective, all certificates of National Video delivered after October 14, 1965, in settlement of any transaction made prior to November 1, 1965, must be accompanied by due bills, and that common stock of National Video would be quoted "ex-dividend" on and after November 1, 1965.

On October 18, 1965, plaintiff requested the defendants to deliver 500 shares of National Video to cover the sale of September 29, and such shares were delivered on October 19, 1965, as above noted. No due bills were requested by plaintiff and none were delivered.

On October 22, 1965, prior to the ex-dividend date of November 1, the Irwins sold another 500 shares of National Video. On October 28, 1965, the Irwins received 1500 shares of National Video stock as a result of the stock split. Because they had not delivered the shares sold on September 29 until October 19, they were still the holders of record on October 14 of 1500 shares, and for that reason received 1500 shares in the split. Even though Irwin received 1500 shares from the split because of his record position on October 14, it is easily seen that he legally only had a right to keep 500 shares, since he had sold 500 shares prior to the split, and had sold 500 shares on October 22 prior to the ex-dividend date.

On November 3, 1965, the Irwins sold another 500 shares of National Video, and on November 4, 1965, sold a further 500 shares, both transactions taking place through plaintiff.

In mid-November, Shields instructed Irwin that he owed plaintiff 2000 shares. Pursuant to that instruction and request, Irwin's secretary, Mrs. Bogan caused 2000 shares of National Video to be delivered to plaintiff on November 16 and 17, 1965. It can be seen from the following chart that, in fact, defendants owed plaintiff 2500 shares at that time. Hence, after delivery of the 2000 shares, defendants were "short" 500 shares, although apparently neither they nor Shields realized it at the time.

Date	# of shares received	# of shares sold	# of shares delivered	Balance of shares possessed	Balance of shares Actually Owned
12/16/64	500	—	—	500	500
4/20/65	1000	—	—	1500	1500
9/29/65	—	500	—	1500	1000
10/19/65	—	—	500	1000	1000
10/22/65	—	500	—	1000	500
10/28/65	1500	—	—	2500	1000
11/3/65	—	500	—	2500	500
11/4/65	—	500	—	2500	0
11/16 & 17/65	—	—	2000	500	0

Irwin testified in his deposition that his month-end customers' statements for November and December, 1965, which reflected a short position of 500 shares, were not received by the Irwins until March, 1966.

On December 27, 1965, while in Fort Lauderdale, Florida, Irwin sold the 500 shares which he continued to hold, for approximately $39,600, through Hayden Stone, Inc., in Fort Lauderdale. Irwin testified that he did not know at the time of this sale, that the records of plaintiff showed him short 500 shares. He added, that had he known plaintiff was going to demand 500 shares of National Video from him, he would not have sold the 500 shares through Hayden Stone.

Irwin further testified that he was not aware until late February or early March, 1966, that plaintiff's records showed him to be in a short position.

Although from the records of plaintiff, the Irwins were short 500 shares from and after October 19, 1965, Travers Bell, Jr., the plaintiff's cashier in Chicago, did not realize the Irwins were short 500 shares until early January when he reviewed the customers' monthly statements for December, 1965. In his judgment, a short position remaining open for such a period of time was not in the ordinary course of business and was very unusual. He immediately contacted Shields. Shields did not know of the short position until contacted by Bell, and was surprised about this development.

Shields then contacted Irwin and told him that plaintiff had discovered that he was short 500 shares of National Video. Shields, however, really was not sure himself of the facts involving the 500 shares, and told Irwin; "this is the most fouled up thing I've seen." Shields admitted to Irwin that plaintiff "apparently did not know what they were doing when he (they) requested (delivery of) the two thousand shares." The date of this conversation is in dispute, plaintiff putting it in early January, 1966, and defendant placing it in late February, or early March, 1966. However, for purposes of this motion, we do not think the dispute is material. Irwin told Shields that he was unaware of any short position, that he had never been in a short position, and "that if they could prove to me that I owed the shares, I would deliver the shares if I had to purchase them." (Irwin Dep. II, pp. 44-45.) He further stated at his deposition: "And I made the statement to him at that time that I had no desire to prove it at the expense of anybody, and that if I owed the shares, I would deliver the shares. But I wanted proof of it." Shields said that he would contact Bell to get further information.

Apparently, Irwin was surprised at the revelation of his short position, for in December, 1965, he had called John D'Asaro, an accountant employed by the firm of Ernst & Ernst, auditors for Irwin's company, who also handled his personal income tax returns. He told D'Asaro, that upon information of his broker, Mr. Shields, plaintiff's records of his transactions in National Video were mixed up, and he wanted to know what his position in that stock was. D'Asaro asked his client what transactions he had made during October, November and December and from that information erroneously concluded and told Mr. Irwin that the defendants owned the 500 shares of National Video which they had retained. D'Asaro did not ask Irwin the dates he had delivered the National Video shares sold through plaintiff, but apparently assumed that the shares defendant sold on September 29 had been delivered in time to be transferred out of the Irwins' names before the October 14 record date. Irwin apparently did not tell his accountant that, in fact, these shares were delivered after the record date. The accountants similarly did not ask, nor were they told by Mr. Irwin, how many shares he actually received in the stock split.

After the conversation with Shields in early 1966, in which Irwin was informed of his short position, he again contacted his accountants and asked them to check his records. Several conversations thereafter transpired between Shields and Irwin or his secretary, Catherine Bogan, with respect to the alleged short position. On March 17, 1966, a three page written demand for delivery of 500 shares was sent by Travers Bell to Irwin. The letter recapitulated the Irwins' transactions in National Video, and concluded with the request that the defendants forward the 500 shares as soon as possible. On March 21, 1966, Irwin replied to Bell acknowledging receipt of his letter, and stating that he would hold it in his files until

he heard from his accountants, at which time he would contact Bell. It is indicative of Shields' confusion in the matter that on March 17, 1966, he informed Mrs. Bogan that the record date of the split was October 28, 1965, and that the first shares sold by the Irwins had been delivered to plaintiff on the same date. The fact was that the record date of the split was October 14, and the first shares sold had ben delivered on October 19. Also Shields admitted in his deposition that when he talked with Mrs. Bogan on March 17, he was still confused as to what had happened with respect to the 500 shares and that as of that date he still was not positive of the Irwin's position in National Video.

On March 23, 1966, Mr. D'Asaro wrote to Irwin listing defendants' transactions and concluding that following the defendants' sales on November 3 and 4, the Irwins were entitled to retain a balance of 500 shares. In preparing this letter, D'Asaro apparently made no new investigation, but simply reviewed the documents and publications which he had consulted in December in initially reaching the same erroneous conclusion. On March 25, Irwin answered this letter, transmitting a copy of Mr. Bell's letter of March 17, and suggesting that Mr. D'Asaro check it and call Irwin back.

On March 28, 1966, John Goebel, an attorney for plaintiff, wrote to Irwin demanding delivery of the 500 shares within five days. Irwin apparently ignored the letter because the matter was still in dispute and under consideration by his accountant.

On April 15, 1966, Bell called Irwin at Columbus, Ohio, where Irwin was attending a business meeting. Bell demanded delivery of 500 shares and said that if they were not delivered, plaintiff would purchase the shares to cover the short position and charge the Irwins' account for

them. Irwin said he had not heard anything more from his accountants. Bell called Irwin a liar. Thereupon, arrangements were made for Bell and Irwin to talk simultaneously with D'Asaro in Chicago. During that call, D'Asaro was evasive, but finally, after being pinned down by Irwin stated that Irwin owed the 500 shares. Subsequently, Irwin received a letter from D'Asaro dated April 15, the date of the telephone call, in which D'Asaro corrected his previous error and advised Irwin that he was in fact short 500 shares of National Video. The error is explained in a memorandum dated April 27, 1966, prepared by D'Asaro.

On April 15, 1966, plaintiff sent telegrams to the defendant demanding delivery of the missing shares by 12 o'clock noon on Monday, April 18, 1966, or plaintiff would buy in 500 shares of National Video for defendants' accounts at the current market price. Subsequently, Irwin advised plaintiff by wire that any shares purchased for his account would be purchased entirely at the risk of plaintiff. On April 18, plaintiff purchased 500 National Video shares in the open market at an aggregate cost of $55,417.96, for which it now sues defendants. The market price was approximately $111 per share. By contrast, at the time when Irwin stated he would deliver the shares if it was proved that he owed them, the stock traded between a high of $88.25 and a low of $70.25 per share. Later, in May, 1966, when the market price was again down to approximately $76.50 per share, the defendants purchased 500 shares of National Video, and unsuccessfully offered them to plaintiff in exchange for a full release of liability.

Defendants' Answer to the Complaint denies any liability. In Affirmative Defense, they raise several matters, including various breaches of contractual duty on the part

of plaintiff, and violations of the Securities Exchange Act of 1934, and of certain rules of the American Stock Exchange.

Plaintiff apparently is willing to concede that its agents gave erroneous advice when they informed the defendants in November that they then owed only 2000 shares. It further is willing to admit the possible disadvantages which could have been caused by its delay until even late February or early March in informing defendants of their short position. Those defenses are raised by defendants to challenge plaintiff's claims which are based upon conversion and breach of contract. However, even assuming the above facts, plaintiff contends that its claims are valid because Irwin's admitted conduct in promising to replace the missing shares if proof was supplied, amounted to a ratification of plaintiff's delays and erroneous advice, and plaintiff relied upon such assurance to its detriment, thereby estopping defendants to deny its liability.

Defendants apparently do not challenge the fact that Irwin promised to deliver the shares if proof could be furnished to show that they owed them. However, they raise several objections to the summary judgment motion including the argument that plaintiff's motion is based upon a theory foreign to the pleadings. Also they charge that material facts remain in dispute inasmuch as (1) it has allegedly not been established that Irwin's promise was made voluntarily and with full knowledge and in light of all the facts and circumstances surrounding plaintiff's wrongdoing, and (2) it has allegedly not been established that plaintiff relied upon Irwin's promise, especially since the facts of such alleged reliance are based upon averments not within the knowledge of defendants.

In the first place, defendants argue that the motion for summary judgment abandons the theories of recovery

relied upon in the Complaint—to wit, breach of contract and conversion—and instead raises for the first time the theories of ratification and equitable estoppel based upon reliance. This argument need not detain us unduly. Certainly, plaintiff's motion is founded upon the theories advanced in the Complaint. The theories of ratification and estoppel are essentialy used as rebuttal arguments, and are raised only in response to the defenses of breach of duty and delay, interposed by defendant. Hence, this initial argument of defendants is wholly without merit.

Secondly, defendants challenge the theory of ratification on the ground that it is yet in dispute whether Irwin's contingent promise to supply the missing shares was made voluntarily and with full knowledge and in light of all the facts and circumstances surrounding plaintiff's derelictions. It is not disputed that plaintiff's erroneous advice and delay in correcting same constituted a negligent breach of its contractual duty as broker to its customer. Nor is it disputed that when informed of the error, in early 1966, Irwin promised to deliver 500 shares when furnished proof that the shares in fact were owing.

The principle of ratification is explained in Meyer, *The Law of Stock Brokers and Stock Exchanges,* 408-412 (1931), as cited by plaintiffs as follows:

> "The general principle is that any wrongful act on the broker's part may at the election of the customer be either ratified or repudiated.
>
> * * * * *
>
> "Any wrong committed by a broker, no matter how serious and no matter what its nature, is susceptible of ratification. This applies to the improper execution of [or] non-execution of an order, to the wrongful sale of the customer's securities or the wrongful covering of short commitments, and to all kinds of miscellaneous breaches of duty to which the broker may

become during the course of relations with his customer.

* * * * *

"The first principle of ratification in stock brokerage transactions is that a customer who wishes to take advantage of his broker's wrongful act must repudiate that act. If he does not he is deemed to have ratified it. He may not merely sit by and do nothing, but is bound at the risk of the loss of his claim affirmatively to indicate his repudiation.

> 'Ratification may be proved, not only by an express assent * * * but also by implication from the principal's acquiescence or failure to dissent within a reasonable time after being informed by the agent of what he has done.'

"This doctrine is not unfair, for the customer should not have the privilege of withholding approval or disapproval until the market has taken a turn for better or for worse, and then assuming the position which turns out the more profitable. To accord the customer that privilege would enable him to speculate at the broker's expense. Moreover, the broker should not be placed in a position where he does not know whether his act will be affirmed or disaffirmed, and therefore cannot act intelligently to minimize his own loss before the market has undergone too great a change. The obligation to repudiate, however, does not depend on whether or not the broker in fact relies on the customer's silence."

Applying that language to the instant set of facts, it is clear that Irwin did not merely silently acquiesce in plaintiff's negligent wrongdoing, but rather affirmatively promised to tender the disputed shares if competent proof could be supplied that they were owing, *even if he had to go out and purchase them.* He did not repudiate his liability until April 15, 1966, after the time when proof of liability was furnished, not only by plaintiff but by his own accountants. We think plaintiff was entitled to

rely upon Irwin's representation, as an assurance that defendants would make good their obligations, despite plaintiff's prior erroneous advice and delays.

The two cases cited by plaintiff are apt illustrations of the principle of ratification as it should apply herein. See *Roney* v. *Mazzara,* 319 Mich. 103, 29 N. W. 2d 259 (1947), and *Gillett* v. *Whiting,* 141 N. Y. 71, 35 N. E. 939 (1894).

Plaintiff agrees with the general proposition that the person charged with ratification must have acted voluntarily and with full knowledge and in light of all the facts and circumstances surrounding such wrongdoing. *Coleman* v. *Connolly,* 242 Ill. 574, 582-83 (1909). Defendants argue that Irwin did not know all the facts and circumstances surrounding the plaintiff's wrongdoing, and thus could not be charged with ratification. They point to the fact that not only Irwin, but also Shields was unaware that the defendants were in a short position. Indeed, as late as March 17, 1966, Shields admitted his confusion to Irwin's secretary. And initially at least, defendants' short position was supported only by Bell's statement to Shields to that effect.

However, the true facts of defendants' position in National Video is irrelevant to the issue of ratification. Irwin's promise contemplated that he would make up the asserted short position if it could be proved that he was short. Whether or not he actually knew he was short at the time he made the promise, is irrelevant to the force of that promise. To say that he cannot be held to such an unqualified promise, because he did not in fact know for certain that he was short, would make the promise virtually meaningless. Of course he did not know the true facts of the situation, for if he had, there would have been less occasion to make the promise in the contingent manner in which it was made.

Further, defendants, have pointed to no material fact regarding the plaintiff's breaches of duty, which Irwin did not know, but should have known in order to be bound by his ratification. It is not relevant that he was uncertain of his position in National Video. What is relevant is that at the time of his promise, he knew all of the material facts regarding the prior breaches of duty he has charged against plaintiff. He knew that plaintiff was calling upon the defendants to deliver 500 shares of National Video stock which plaintiff claimed were owing from sales in late 1965. Because he was apparently unaware of his short position, he demanded verification, requested his accountants to check into the matter, and expressly promised he would deliver the missing shares if it developed that he owed them. At that time, Irwin had full knowledge of all of the circumstances surrounding the alleged breaches of duty. Although defendants claim to the contrary, they have cited no specific facts of which he was unaware which might have affected the making of the promise.

As explained in the Meyer treatise cited above, the doctrine of ratification is designed to prevent a customer from speculating at his broker's expense, and to be sure that the broker will know whether his acts will be affirmed or disaffirmed and be able to act to minimize his own loss before the market changes. The price prevailing at the time Irwin ratified plaintiff's wrongdoing by his promise was substantially below the market price on April 15, when Irwin repudiated his obligation. This seems to be the type of case in which the doctrine of ratification should be applied. In our judgment, defendants were bound by Irwin's promise, which acted to ratify plaintiff's prior wrongdoing.

Furthermore, we do not believe that any issue of material fact exists with respect to the question of reliance, Mr. Ellis, Executive Vice-President of plaintiff's Great

Lakes Regional Office, in Chicago, testified quite explicitly that plaintiff relied upon Irwin's promise. He testified that when a customer fails to deliver securities sold by him, plaintiff's policy is to have its registered representative contact the customer to obtain delivery. If the customer repudiates his contract, plaintiff's policy is to cover the sale and charge the customer for any resulting loss. Considering Irwin's reputation, his relationship with plaintiff, the fact that plaintiff had never had any trouble with Irwin, plus Irwin's assurance that if he were short, he would supply the stock, it is most reasonable to assume that plaintiff had no reason to be alarmed about the Irwins' short position, and relied upon Mr. Irwin's assurance.

That neither Shields nor Bell testified regarding reliance, does nothing to disturb this conclusion. When Bell directed Shields to inform Irwin of his short position, Irwin made his promise to cover any short position and asked his accountants to check his records. After receiving Bell's letter of March 17, he replied that he would communicate with Bell after hearing from his accountants. He did not receive final word from his accountants until April 15, at which point he repudiated his obligation and promise.

The effect of Irwin's assurance was to tell plaintiff that it need not take any action to protect itself while his accountants were determining his position. This obviously was the reason plaintiff waited until April 18 before covering Irwin's short position. That Bell and Shields continually pressed Irwin for an answer does not negate their reliance on his promise. It was consonant with their position and responsibilities to seek an early determination of the matter, rather than allowing it to await the leisure of the defendants or its accountants. A probable reason for the delay until April 15 was the accountants' reluctance to admit its mistake. Certainly as registered dealers, plain-

tiff had an obligation to make provisions to cover the missing shares as soon as possible. Its agents' repeated attempts to obtain the shares from Irwin was only in pursuance of their professional responsibilities.

That Ellis' testimony on the reliance issue came only two week prior to the close of discovery does not detract from the weight to be accorded it, especially in the absence of any facts to suggest that it is inaccurate. Although testimony respecting reliance is a matter peculiarly within the knowledge of plaintiff's agents, defendants had an ample opportunity to cross-examine Ellis on this point, but made no attempt to shake his testimony thereon, even though they subjected him to substantial cross-examination on other matters.

Defendants assert that they have had no opportunity to disprove the plaintiff's evidence of reliance. However, they fail to describe any facts whatever that they hope or expect to obtain by further discovery on this matter. Discovery in this case has been closed for some time. The law is clear that summary judgment may not be thwarted by mere hypothesis. Where specific proof is offered to support the motion, the party opposing it must at least set forth something specific which it believes can be adduced which would create an issue of fact. *Radio City Music Hall Corp.* v. *United States*, 135 F. 2d 715, 718 (2d Cir. 1943). The instant defendants have failed to do so here.

Equitable estappel is a proper doctrine to apply in the instant factual situation. Not only did plaintiff rely on Irwin's promise, but in addition, plaintiff's derelictions, later ratified by Irwin, cause no damage or loss to defendants. The only consequence of plaintiff's actions was that defendants were left with 500 shares which did not belong to them, and which they sold for almost $40,000. Even had

the plaintiff's breaches of duty not been ratified such wrongdoing should not inure to defendants' benefit where they suffered no loss thereby. The upshot of this entire sequence of events is that defendants have thus far been unjustly enriched in a substantial sum.

In view of the finding which we have made above on the issues of ratification and reliance, it is clear that plaintiff is entitled to recover on either of its theories of conversion or breach of contract.

To recover for conversion, the plaintiff need only show its right to possession of 500 National Video shares which defendants unlawfully retained in their possession during the period of the contract. Plaintiff had this right by virtue of the defendants' contract requiring them to deliver the stock upon its sale. See *Horn v. Nessen Lumber Co.*, 236 Ill. App. 187, 207-08 (1925); and see Annot. 83 A. L. R. 1199. The cases cited by defendants are inapposite to the instant factual situation.

Furthermore, plaintiff assumed breaches of its contractual duty, which were raised in defense of the action for breach of contract, are no longer of any force, due to our findings of ratification, reliance and estoppel. And as plaintiff observes, the authorities cited by defendants on this point have nothing to do with the facts of this case. Although other distinctions exist, it is sufficient to point out that they relate to the acceptance of "goods" by failing to reject them within a reasonable time, rather than to the delivery by a customer to his broker of securities which he owes.

Nor are the other affirmative defenses raised by defendants of any value in resisting the motion for summary judgment. Defendants apparently acquiesce in that viewpoint, for in their answering brief, they have failed to

respond to the arguments put forth in opposition to those defenses by plaintiff.

Defendant has not specified how plaintiff has violated the margin rules of Regulation T. (12 C. F. R. Part 220 (1967)). Those rules relate solely to margin accounts, not to cash accounts which are involved here. The failure of plaintiff to buy in shares for defendants' account until April 18, does not constitute an extension of credit. See Section 4(c)(ii) of Regulation T. Furthermore, Section 6(k) of Regulation T excuses any violations which are based upon innocent mistake, if prompt action is taken to remedy the mistake after its discovery. Thus even if plaintiff were guilty of a technical violation, which it is not, it would be exonerated under Section 6(k). As stated above, defendants apparently have no quarrel with this conclusion.

Nor is plaintiff barred from recovery for failing to request due bills when defendants delivered shares on October 19. Although the American Stock Exchange rule of October 8, 1965, relating to the National Video split, directed the transmission of due bills in certain circumstances, Mr. Ellis testified, and it apparently is not disputed, that the requirement of due bills applies only to dealings between brokers on the floor of the Exchange. Under industry practice, due bills are not exchanged between a broker and his customer. Clearly, defendants' argument, made only in affirmative defense to the Complaint and not advanced or supported in opposition to this motion, has no merit.

Finally, defendants' attempt to invoke the doctrines of estoppel and waiver on their own behalf is unavailing. There is no evidence that defendants relied upon plaintiff's erroneous advice to its detriment, a necessary element of estoppel. The only consequence of defendants' reliance

was that they remained in possession of stock which did not belong to them. When they sold the stock on December 27, 1965, they did so partially upon the erroneous advice of their own accountants. In any event, Irwin ratified the wrongful actions of plaintiff. Once plaintiff relied upon that representation, defendants were estopped to challenge their own breach of contract.

Plaintiff cannot be deemed to have waived its contractual rights by its delay in requesting the missing shares. Waiver is the knowing and deliberate relinquishment of a right. *Perin* v. *Parker,* 126 Ill. 201 (1888). Plaintiff never intended to waive its rights. Indeed, we have already held that it relied upon Irwin's ratification. Defendants' argument is without basis.

Since we believe there are no issues of material fact remaining for decision, we shall grant plaintiff's motion for summary judgment.

The parties are directed to prepare an order to that effect.

Enter:

/s/ Abraham L. Marovitz,
Judge.

Dated: March 29, 1968.